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IN THE
COURT OF APPEALS OF INDIANA

CHEROKEE AIR PRODUCTS, INC., f/k/a TIPPMANN PNEUMATICS, INC.,	)	
Appellant-Defendant,	)	
vs.	)	No. 02A03-0610-CV-494
PURSUIT MARKETING, INC.,	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ALLEN CIRCUIT COURT
The Honorable Thomas J. Felts, Judge
Cause No. 02C01-0412-CC-1215

June 21, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Cherokee Air Products, Inc.[1] ("Cherokee"), a duly organized Indiana corporation, appeals from the trial court's order granting the motion of Pursuit Marketing, Inc. ("Pursuit") for judgment on the pleadings after Cherokee filed a third-party complaint against Pursuit.

We affirm.

ISSUE

Whether the trial court erred when it granted judgment on the pleadings in favor of Pursuit.

FACTS

Cherokee manufactured a Tippmann Pneumatics Model 98 paintball gun,[2] serial number 171633. On or about October 13, 2000, Cherokee shipped the paintball gun to Pursuit, a paintball gun distributor located in Illinois. Cherokee shipped the paintball gun in its original box, along with safety instructions, an owner's manual, and a barrel plug, "which, when inserted into the end of the barrel, would block a paintball from being discharged." (App. 87).

Pursuit sent the paintball gun back to Cherokee on December 22, 2000, requesting that Cherokee repair and return the paintball gun to Pursuit, which Cherokee did. On or about January 10, 2001, Pursuit sold and shipped the repaired paintball gun to Paintball Authority, a retail shop located in Virginia. Pursuit sold and shipped the paintball gun

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[1] Cherokee was formerly known as Tippmann Pneumatics, Inc.

[2] Paintball guns may be referred to as paintball markers.

without the barrel plug. Furthermore, Pursuit marketed the paintball gun as refurbished. In January of 2001, Ray Fox purchased the paintball gun from Paintball Authority for his son, Curtis.

On August 5, 2001, Curtis and his brother, Joseph, went to the home of their friend, Ben Zatkulak, intending to play paintball. Curtis prepared his paintball gun for play by attaching a hopper, a device which houses and loads paintballs into the gun's barrel, and the carbon dioxide canister, which propels the paintballs through the gun's barrel with compressed carbon dioxide. At some point, however, the boys decided not to play paintball.

Curtis detached the hopper from his paintball gun but left the carbon dioxide canister attached. Unaware that a paintball remained in the paintball gun's barrel and without inserting a barrel plug, Curtis pointed his paintball gun toward Ben's brother, Shea. When Curtis pulled the trigger, a paintball discharged, hitting Shea below his right eye. Shea eventually lost his eye.

Shea, by his parents, filed an action in Virginia against Cherokee and Paintball Authority. Pursuit was later joined as a party through Paintball Authority's third-party claim against Pursuit. Shea entered into a settlement agreement with all parties except Cherokee. The trial court approved the settlement and on February 26, 2003, entered an order, providing as follows:

> [P]ursuant to Virginia Code § 8.01-35.1, that all claims made by or which could have been made by [Cherokee] or any other tortfeasor for contribution against [Pursuit] are released, discharged and dismissed and rendered null and void by this settlement and release and are hereby

> DISMISSED WITH PREJUDICE . . . . This Order does not affect any claims that [Pursuit] may have for indemnity against [Cherokee].

(App. 151). As Pursuit's insurer, Burlington Insurance Company ("Burlington") incurred $46,212.85 in fees and costs to settle Shea's claim.

Pursuant to local procedure, Shea voluntarily dismissed the action and filed a second action in Virginia against Cherokee. Subsequently, Cherokee and Shea entered into a confidential settlement agreement.

On December 20, 2004, Burlington filed a complaint against Cherokee in Indiana's Allen County Circuit Court. The complaint alleged, inter alia, the following:

> 44. The Tippmann Pneumatic Model 98 paintable [sic] gun was defectively designed since there is no way for an individual to visually confirm that the gun i[s] unloaded . . . .
>
> * * *
>
> 47. The owner[']s Manuel [sic] failed to warn that a paintable [sic] can become lodged in the barrel of the gun.
>
> * * *
>
> 53. The defective design of the Tippmann Pneumatic Model 98 paint ball gun fired by Curtis Fox proximately contributed to the accident.
>
> 54. The inadequate warnings in the Tippmann Pneumatic Model 98 paint ball gun owner[']s Manuel [sic] proximately contributed to the accident.
>
> * * *
>
> 58. Under Virginia law, in this typical product liability case the manufacturer [Cherokee] and all sellers (including intermediary sellers like [Pursuit]) made both expressed and implied warranties regarding fitness for a particular purpose and merchantability.
>
> * * *

60. [Pursuit']s sole involvement in this matter was as a conduit or middleman for resale of the Tippmann Model 98 paintable [sic] gun to Paint Ball Authority[,] who ultimately sold the product to the Foxes.

61. Virginia law holds that an implied contract of indemnity arises from the implied warranty of merchantability. When a seller [sic] such as [Cherokee] is held liable for a defect[,] which also constitutes a breach of the implied warranty, a seller such as [Pursuit] is entitled to indemnity from a manufacturer such as [Cherokee].

62. There were no independent acts of negligence committed by [Pursuit,] which proximately caused the accident.

63. Shea Zatkulak, an infant, who sued through Carl and Christine Zatkulak, his parents and next friend, and Carl and Christine Zatkulak, individually, as plaintiffs sued [Cherokee], Paintable [sic] Authority LLC, [Pursuit] and Curtis Fox as defendants . . . .

64. [Pursuit], by counsel, gave notice to [Cherokee] that [Pursuit] was tendering defense of claims by such plaintiffs against [Pursuit] to [Cherokee].

65. [Cherokee], by counsel, rejected such tender.

66. [Pursuit] was left to fend for itself without the assistance of [Cherokee,] which had provided the paint ball gun in question to [Pursuit].

67. [Cherokee] was required to employ attorneys to represent it against the claims in the state court action in Virginia . . . . Attorney fees were incurred by counsel for [Pursuit] both before and after [Pursuit] attempted to tender the defense of such case to [Cherokee].

68. On the date of the accident [Pursuit] carried a policy of insurance with [Burlington], and pursuant to such policy of insurance[, Burlington] has paid on and in behalf of its insured to the plaintiffs Zatulak [sic] in settlement of the Virginia state court lawsuit . . . .

69. [Burlington] has also paid attorney fees and expenses to counsel who represented [Pursuit] in defense of the claims brought by the [Zatkulaks] for which [Burlington] is entitled to be reimbursed by [Cherokee] under Virginia law.

(App. 52-55). Burlington sought $46,212.85 plus attorney fees, interest and costs from Cherokee. On February 23, 2005, Cherokee filed its answer and affirmative defenses, denying liability for Burlington's claims.

Also on February 23, 2005, Cherokee filed a third-party complaint against Pursuit, alleging

> negligence, strict liability, breach of contract, breach of warrant, misrepresentation, fraud, misappropriation and/or other liability producing conduct in failing to distribute [Cherokee]'s product in the same condition as it was when it left [Cherokee]'s factory initially, which was a proximate cause of said injury to minor plaintiff, Shea Zatkulak, and thus, a cause of Plaintiff's damages.

(App. 88). Cherokee sought compensatory and punitive damages against Pursuit for costs incurred in defending and settling the lawsuits filed by Shea. Specifically, Cherokee sought judgment against Pursuit or, in the alternative, a finding that Pursuit

> [is] solely liable to [Burlington], [j]ointly and severally, and/or comparatively liable with [Cherokee] or liable over to [Cherokee], by way of contribution or indemnity and liable for compensatory and punitive damages . . . and/or reimbursement of costs incurred in the defense and/or settlement of the Virginia lawsuits.

(App. 95). Pursuit filed its answer and affirmative defenses, including failure to state a claim upon which relief could be granted, on September 30, 2005.

On March 30, 2006, Pursuit filed a motion for judgment on the pleadings and brief in support thereof, asserting that Cherokee's "claims amount to nothing more than a claim for indemnity since Cherokee's alleged damages are based on the costs incurred by Cherokee of defending and settling the Virginia personal injury lawsuit." (App. 108). Pursuit further asserted that "Cherokee's claims against [Pursuit] fail because Cherokee,

the manufacturer of the paintball gun, has no legal basis for indemnity against [Pursuit], a downstream distributor of the paintball gun." *Id.*

In its brief in opposition to Pursuit's motion for judgment on the pleadings, Cherokee reiterated its claim for contribution against Pursuit. Specifically, Cherokee cited to Virginia's statutory law, namely Virginia Code section 8.01-34.

On April 25, 2006, the trial court entered an order denying Pursuit's motion for judgment on the pleadings. On its own motion, however, the trial court vacated its order and set a hearing on the motion for judgment on the pleadings.

On May 16, 2006, Pursuit sought leave to file an amended answer by interlineation, arguing that Cherokee, for the first time, raised "a theory of contribution pursuant to a Virginia statute, Virginia Code § 8.01-34" in its opposition to Pursuit's motion for judgment on the pleadings. (App. 145). Pursuit sought to plead the affirmative defenses of release and res judicata. The trial court granted Pursuit's motion for leave to file an amended answer on May 22, 2006. On June 7, 2006, Pursuit filed its reply brief in support of its motion for judgment on the pleadings.

The trial court held a hearing on Pursuit's motion for judgment on the pleadings on June 9, 2006. On September 11, 2006, the trial court entered its order, finding that Cherokee's third-party complaint failed to state a claim upon which relief could be granted. Accordingly, the trial court granted judgment on the pleadings in favor of Pursuit.

Additional facts will be provided as necessary.

DECISION[3]

Cherokee asserts that the trial court erred in granting judgment on the pleadings in favor of Pursuit. Specifically, Cherokee contends that its third-party complaint states actionable claims for misappropriation and fraudulent representation, as well as claims for indemnity and contribution.

> [A] motion for judgment on the pleadings pursuant to [Indiana Trial] Rule 12(C) attacks the legal sufficiency of the pleadings. The test to be applied when ruling on a Rule 12(C) motion is whether, in the light most favorable to the non-moving party and with every intendment regarded in his favor, the complaint is sufficient to constitute any valid claim. In applying this test, we may look only at the pleadings, with all well-pleaded material facts alleged in the complaint taken as admitted, supplemented by any facts of which the court will take judicial notice. The standard of review is de novo, and we will affirm the trial court's grant of a Rule 12(C) motion for judgment on the pleadings when it is clear from the face of the pleadings that one of the parties cannot in any way succeed under the operative facts and allegations made therein.

Fox Dev., Inc. v. England, 837 N.E.2d 161, 165 (Ind. Ct. App. 2005) (citations omitted).

1. Misappropriation

Cherokee asserts that it has a claim for misappropriation. We disagree.

Regarding its claim for misappropriation, Cherokee alleged in its complaint the following:

> 22. In holding itself out to be a distributor of [Cherokee] products, including the subject Model 98 paintball gun, . . . while at the same time marketing and selling its own products and accessories that compete with [Cherokee]'s products, [Pursuit] was in a unique position to represent to

[3] The parties apparently agree that the substantive law of Virginia applies, while Indiana law governs the procedural aspects and the standard of review.

> downstream purchasers, including Paintball Authority, that the [Cherokee] products it was distributing were products that were in the same condition and high quality as the products that left [Cherokee]'s facility. Likewise, [Pursuit] was in a position to alter [Cherokee]'s products in a way that would adversely affect the condition of the product as well as the warranties made by [Cherokee] about the product, thus adversely affecting [Cherokee]'s liability position vis a vis products liability claim and [Cherokee]'s reputation in the industry and among the consumer public.
>
> 23. [Pursuit], in selling the subject Model 98 paintball gun . . . without the barrel plug initially supplied by [Cherokee], and in advertising same for sale, after returning the subject paintball gun to [Cherokee] for repair and reselling it to Paintball Authority as a "refurbished" paintball gun, without explaining to the downstream purchaser that it was a "used" paintball gun that had been repaired, misappropriated [Cherokee]'s advertising ideas and/or style of doing business, and misappropriated [Cherokee]'s name, reputation and product for its own use resulting in economic damage to [Cherokee] and damage to its reputation and good name, and, in so doing, disparaged [Cherokee]'s good [sic], products or services.

(App. 91-92).

Virginia does not recognize the common law tort of misappropriation. *See Superformance Int'l, Inc. v. Hartford Cas. Ins. Co.*, 203 F. Supp.2d 587, 597 (E.D. Va. 2002), *aff'd*, 332 F.3d 215 (4th Cir. 2003). Rather, in Virginia, the right to maintain an action for misappropriation is purely statutory.

Virginia Code section 59.1-336 defines misappropriation as follows:

> 1. Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or
> 2. Disclosure or use of a trade secret of another without express or implied consent by a person who
>
> a. Used improper means to acquire knowledge of the trade secret; or
>
> b. At the time of disclosure or use, know or had reason to know that his knowledge of the trade secret was
>
> (1) Derived from or through a person who had utilized improper means to acquire it;

> (2) Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use;
> (3) Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or
> (4) Acquired by accident or mistake.

A trade secret is defined as

> Information, including but not limited to, a formula, pattern, compilation, program, device, method, technique, or process, that:
>
> 1. Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and
> 2. Is the subject of efforts that reasonable under the circumstances to maintain its secrecy.

Va. Code § 59.1-336.

Virginia also recognizes a statutory claim for misappropriation of likeness. Specifically, Virginia Code section 8.01-40(A) provides in part as follows:

> Any person whose name, portrait, or picture is used without having first obtained the written consent of such person, or if dead, of the surviving consort and if none, of the next of kin, or if a minor, the written consent of his or her parent or guardian, for advertising purposes or for the purposes of trade, such persons may maintain a suit in equity against the person, firm, or corporation so using such person's name, portrait, or picture to prevent and restrain the use thereof; and may also sue and recover any damages for any injuries sustained by reason of such use.

(Emphasis added). Clearly, Cherokee has no cause of action under Virginia Code section 59.1-336 because it is not asserting the misappropriation of a trade secret and has no cause of action under Virginia Code section 8.01-40 because it is not a person.

On appeal, Cherokee couches its argument regarding misappropriation in terms of "trade defamation." Cherokee's Br. 15. Cherokee, however, did not make this argument

to the trial court. An appellant who presents an issue for the first time on appeal waives the issue for purposes of appellate review. *Mid-States Gen. & Mech. Contracting Corp. v. Town of Goodland*, 811 N.E.2d 425, 438 (Ind. Ct. App. 2004).

Furthermore, while Cherokee does cite to some authority on appeal, it fails to cite to authority supporting its argument that Pursuit's statements were defamatory and fails to adequately develop its argument. *See Superformance*, 203 F. Supp.2d at 599-600 (discussing what constitutes a defamatory statement). We will neither become an advocate for a party nor address poorly developed arguments. *Thacker v. Wentzel*, 797 N.E.2d 342, 345 (Ind. Ct. App. 2003). Thus, again, Cherokee's argument is waived. *See id.*

2. Fraudulent Misrepresentation

Cherokee also asserts a claim for fraudulent misrepresentation. Cherokee's complaint sets forth this claim as follows:

> 27. In holding itself out to be a distributor of [Cherokee] products, including the subject Model 98 paintball gun, . . . while at the same time marketing and selling its own products and accessories that compete with [Cherokee]'s products, [Pursuit] was in a unique position to represent to downstream purchasers, including Paintball Authority, that the [Cherokee] products it was distributing were products that were in the same condition and high quality as the products that left [Cherokee]'s facility.
>
> 28. [Pursuit], in selling the subject Model 98 paintball gun . . . without the barrel plug initially supplied by [Cherokee], and in advertising same for sale, after returning the subject paintball gun to [Cherokee] for repair and reselling it to Paintball Authority as a "refurbished" paintball gun, without explaining to the downstream purchaser that it was a "used" paintball gun that had been repaired, misappropriated [Cherokee]'s advertising ideas and/or style of doing business, and misappropriated [Cherokee]'s name, reputation and product for its own use resulting in economic damage to

> [Cherokee] and damage to its reputation and good name, and, in so doing, disparaged [Cherokee]'s good [sic], products or services.

(App. 93).

As with Cherokee's claim of misappropriation, Cherokee fails to cite to authority supporting its claim of fraudulent misrepresentation. Accordingly, Cherokee's argument is waived. *See Thacker*, 797 N.E.2d at 345.

3. Contribution

Cherokee contends that it is entitled to contribution from Pursuit pursuant to Virginia law. We disagree.

Virginia Code section 8.01-34 provides: "Contribution among wrongdoers may be enforced when the wrong results from negligence and involves no moral turpitude." Furthermore, Virginia Code section 8.01-35.1 provides, in relevant part, as follows:

> A. When a release or a covenant not to sue is given in good faith to one of two or more persons liable in tort for the same injury, or the same property damage or the same wrongful death:
>
> * * *
>
> 2. It shall discharge the tort-feasor to whom it is given from all liability for contribution to any other tort-feasor.

(Emphasis added).

In this case, Shea filed suit against Cherokee and Paintball Authority, which impleaded Pursuit as a third-party defendant. Shea, Pursuit and Paintball Authority eventually entered into a settlement agreement. The trial court approved the settlement agreement and ordered "that all claims made by or which could have been made by [Cherokee] or any other tortfeasor for contribution against [Pursuit] are released,

discharged and dismissed and rendered null and void by this settlement and release . . . ." (App. 151). Accordingly, we find that Cherokee's claim for contribution is barred.

Cherokee, however, maintains that Virginia Code section 8.01-35.1 does not bar its action against Pursuit because Cherokee "is seeking to recover from [Pursuit] based upon its conduct which gave rise to the suit—the alteration and misrepresentation of the paintball marker in its sale to the Fox family." Cherokee's Reply Br. 5. Cherokee concludes that it "is asserting claims for injuries it sustained as a result of [Pursuit]'s conduct," which "clearly is outside the contribution statute." *Id.*

Rather than arguing that its claim is somehow exempted from Virginia Code section 8.01-35.1, and therefore, Cherokee is entitled to contribution under Virginia Code section 8.01-34, Cherokee appears to be asserting that its claim under Virginia Code section 8.01-34 is not one for contribution but rather is a separate tort claim against Pursuit. However, other than its fraudulent misrepresentation and misappropriation claims, which we have addressed, Cherokee raises no other tort claim on appeal. Thus, Cherokee's argument that Virginia Code section 8.01-35.1 is inapplicable is waived. *Thacker*, 797 N.E.2d at 345.[4]

4. Indemnification

Cherokee further asserts that it is entitled to indemnification. Cherokee maintains that Pursuit, by selling the paintball gun after it had been repaired and without the barrel

[4] Because we find that Cherokee's claim for contribution is barred by statutory law, we need not address Pursuit's assertion that the doctrine of res judicata also bars the claim.

plug, "makes [Pursuit] responsible to [Cherokee] for the amounts paid by [Cherokee] to settle" Shea's lawsuit. Cherokee's Br. 18.

In *White v. Johns-Manville Corp.*, 662 F.2d 243 (4th Cir. 1981), the court addressed manufacturers' contractual claims for indemnity against purchasers of their products. The manufacturers alleged that their claims "ar[o]se from an implied warranty running back to them from the purchasers of their products . . . to exercise due care to protect" the purchasers' employees from harm." 662 F.2d at 247-48. Finding that "[t]his 'reverse warranty' theory distorts the concept of implied warranty," the Fourth Circuit determined that "[a]pplying Virginia common and statutory law, the district court properly found [the manufacturers'] claim to be without merit." *Id.* at 248.

Regarding the manufacturers' noncontractual claims for indemnity, the Fourth Circuit noted that the manufacturers sought to transfer "ultimate liability" to the purchasers of the products on the theory that the purchasers were "actively negligent and thus primarily liable" while the manufacturers "were only passively negligent or otherwise at fault and thus secondarily liable in respect of the injuries allegedly sustained by plaintiffs." *Id.* at 249.

"Where the indemnitee's liability is merely constructive, vicarious or derivative, the burden for the entire loss may be shifted to the indemnitor whose actual fault caused the injury." *Id.* To the extent, however, "indemnity allegations might be read to charge . . . fault as an intervening or superseding cause in relation to any conduct of [the party seeking indemnification]," that party seeking indemnification has "not invoked a right to indemnity but an absolute defense to the main claims." *Id.* at 250. Such allegations

"negate[] by denying legal causation the predicate for indemnity that some form of 'secondary' liability will have been established against the party seeking indemnity." *Id.*

In this case, Cherokee asserts that Pursuit's actions, including selling the paintball gun without the barrel plug and marketing the paintball gun as refurbished once it had been repaired by Cherokee, "became [acts] of superseding negligence." Cherokee's Br. 19-20. Also, in Cherokee's Brief in Opposition to Pursuit's Motion for Judgment on the Pleadings, Cherokee argued that Pursuit actions constituted "superseding negligence[.]" (app. 127).

Such a theory, however, "do[es] not give rise to a right to indemnity," but rather gives rise to the right of "exoneration from any liability on the basis that [Pursuit]'s active fault intervened as a superseding cause of [Shea's] injuries[.]" *See White*, 662 F.2d at 250. Although Cherokee's "superseding cause defense may of course be asserted" as a defense, it does not support a claim for indemnity. *See id.*

Given the law of Virginia, it is clear that Cherokee's claim for indemnification cannot in any way succeed under the facts and allegations set forth in the pleadings. Thus, judgment on the pleadings was proper.

Affirmed.

KIRSCH, J., and MATHIAS, J., concur.